2015-1542(L); -1569 XAP

In The

United States Court Of Appeals
For The Federal Circuit

AERO-STREAM, LLC.,

Plaintiff - Cross-Appellant,

v.

SEPTICAIRAID, LLC.; ARTIE ZABEL,

Defendants - Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, CASE NO. 2:12-CV-00190-LA

BRIEF OF CROSS-APPELLANT

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FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Aero-Stream, LLC v. SepticairAid, LLC and Artie Zabel

No. 15-1542

CERTIFICATE OF INTEREST

Counsel for the ~~(petitioner) (appellant) (respondent)~~ (appellee) ~~(amicus)~~ (name of party) Aero-Stream, LLC certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Aero-Stream, LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

N/A

4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Katherine W. Schill and S. Edward Sarskas; Michael Best & Friedrich, LLP

04/23/15
Date

/s/ Katherine W. Schill
Signature of counsel

/s/ Katherine W. Schill
Printed name of counsel

Please Note: All questions must be answered
cc: all counsel of record via ECF

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STATEMENT OF RELATED CASES

Under Federal Circuit Rules 28(a)(4) and 47.5, counsel for Aero-Stream states: (a) no other appeal in or from the same civil action in the trial court was previously before this or any other appellate court; and (b) no other case known to counsel to be pending in this or any other court will directly affect or be directly affected by this Court's decision in this appeal.

JURISDICTIONAL STATEMENT

Aero-Stream does not take issue with Defendant/Appellant's statement on jurisdiction. Aero-Stream timely filed its notice of cross-appeal on April 17, 2015, fourteen days after Defendant/Appellant's notice of appeal.

STATEMENT OF THE ISSUES

The District Court entered final judgment on Plaintiff/Cross-Appellant Aero-Stream LLC's ("Aero-Stream") motion for summary judgment on the trademark counterclaims of Defendants/Appellants Septicair Aid, LLC and Artie Zabel (collectively, "Zabel"). In doing so, the District Court ruled that, as a matter of law, Zabel did not have trademark rights in the name "Septicair Aid." The District Court then granted Aero-Stream's motion for voluntary dismissal of its patent claims, and dismissed Zabel's patent counterclaims as moot. The District Court denied Zabel's request for an award of all attorneys' fees allegedly expended over the course of litigation between the two parties.

The issues raised by Zabel's appeal are:

1. Did the District Court err in holding "Septicair Aid" is a descriptive mark?

2. Did the District Court err in holding "Septicair Aid" had not acquired secondary meaning?

3. Did the District Court err in holding it did not have jurisdiction over Zabel's patent counterclaims after Aero-Stream dismissed its patent infringement claims?

4. Did the District Court err in denying Zabel's request for attorneys' fees?

Aero-Stream also affirmatively raises the following issue on cross-appeal:

5. Did the District Court err by denying Aero-Stream's request for sanctions?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Aero-Stream does not disagree with Zabel's Statement of the Case, and supplements with the following:

On August 8, 2014, Aero-Stream moved for sanctions under Federal Rule of Civil Procedure 11 ("Rule 11"), contending that Zabel did not have a good faith basis upon which to bring his trademark counterclaims, and that those counterclaims were brought for the sole purpose of harassing Aero-Stream and its owner, Zabel's former employer, and unnecessarily increasing litigation expenses. This motion was fully briefed on September 16, 2014, and on March 5, 2015, the District Court denied the Rule 11 motion. Judgment on this Rule 11 motion was entered the same day. Zabel filed his Notice of Appeal on April 3, 2015, and Aero-Stream filed its notice of cross-appeal on April 17, 2015.

II. STATEMENT OF FACTS

A. Karl Holt Launches Aero-Stream to Market an Innovate Patented Solution to Septic System Problems.

Karl Holt founded Aero-Stream in 2002. A0152, ¶ 6. In 2002, Holt began investigating solutions for his own failed septic system and eventually developed and designed the first generation of the Aero-Stream® Remediator®. A0299, ¶ 2. Subsequent innovations resulted in Aero-Stream® products that achieve much higher oxygen transfer efficiency with lower air flow, resulting in much lower power consumption and cleaner water. A0299, ¶ 3. Holt's hard work paid off when he was awarded a United States Patent for his invention on an aerobic method for maintaining a home septic system. A0046, ¶ 6. Holt assigned his U.S. Patent to Aero-Stream. A0299-0300, ¶ 4.

Today, Aero-Stream® Remediation Systems are installed in thousands of septic systems across North America, saving homeowners millions of dollars in septic system repair and replacement costs. A0300, ¶ 5. Owners of property with septic systems experiencing problems such as frequent back-ups and slow-flowing drains, wastewater pooling in the yard, septic odor, frequent tank pumpings, high water levels in the septic tank, and runback into the septic tank from the drainfield, wanted a more economical solution. A0300, ¶ 6. Aero-Stream® products fix septic system problems without the high cost of replacing a septic system by converting a conventional system to an aerobic septic system, which fixes and restores failed septic systems for residential and commercial applications. A0300, ¶ 7. Before Holt invented Aero-Stream's aerobic method of solving septic system problems, property owners were often forced to replace their septic systems at a cost of approximately $8,000 to $40,000. A0300, ¶ 8. Compared to the cost of septic system repair or replacement, Aero-Stream® Remediation Systems present a very economical alternative, ranging from $797 to $1,497. A0300, ¶ 9.

Aero-Stream's patented septic tank aeration systems are featured both on-line and in more than 10,000 retailers across United States and Canada. A0300, ¶ 10. Several Aero-Stream® models have been tested and approved by Underwriters Laboratories, the standard for electrical certification and safety. A0301, ¶ 12.

Aero-Stream also has an established history of customer satisfaction. Aero-Stream has an A+ rating from the Better Business Bureau. A0301, ¶ 15. Of its 163 independent reviews on CustomerLobbby.com as of June, 2014, Aero-Stream received 154 five-star reviews, 8 four-star reviews, and one three-star review. A0301, ¶ 16. Aero-Stream and its products have been featured, *inter alia*, in The Business Journal and the Milwaukee Journal Sentinel and on NBC's Morning News television show. A0301, ¶ 17.

The marketplace has responded positively to Aero-Stream's innovative products and excellent customer service. Aero-Stream sold approximately $1.1 million in 2013 alone. A0301, ¶ 18. Aero-Stream invests heavily in building and maintaining its brand, and in 2013 spent $193,826 in advertising and promotion. A0301, ¶ 19.

B. Aero-Stream Hired Zabel to do Internet Marketing.

In 2007, Aero-Stream hired Zabel to run its internet marketing. A0225, p.16-17. Prior to working at Aero-Stream, Zabel had no experience with septic tanks, except for "unclogging lines" on his own personal septic system. A0225, p.16.

Zabel had no other education, training or experience with septic systems. *Id.* When he was hired by Aero-Stream to do internet marketing, Zabel signed a non-compete agreement with Aero-Stream, in which he promised to maintain confidentiality of Aero-Stream's trade secrets and not unfairly compete with Aero-Stream. A0305. Zabel worked at Aero-Stream until the spring of 2010. A0226, p.20. At that time, Aero-Stream was forced to terminate Zabel. A0302, ¶ 23.

C. After Leaving Aero-Stream, Zabel Starts Septicair Aid to Harm Aero-Stream.

Approximately one year after leaving Aero-Stream, in April of 2011, Zabel formed Septicair Aid, LLC ("Septicair Aid"). A0153, ¶ 10. Septicair Aid was ostensibly formed "for the purpose of marketing and selling aerators for use in septic systems, via the internet." *Id.* Zabel started Septicair Aid with two relatives who were both unemployed, neither of whom had any education, training or experience with septic systems. A0245, p.98-99. Both of those individuals withdrew from Septicair Aid in less than a year, leaving Zabel as Septicair Aid's sole employee. A0224, pp.13-15. The only other person associated with the company is Zabel's brother, who intermittently helps Zabel build aerators without compensation from Septicair Aid. A0224, p.14.

Zabel decided on the name "Septicair Aid" by himself. A0229, p.33. He decided on "Septicair Aid" after doing internet searches for open domain names, and chose Septicair Aid because it "was a cool name." *Id.* In May of 2011, Zabel registered the domain name "septicairaid.com." A0153, ¶ 11.

Zabel testified that he competes not only against other septic aeration manufacturers, but against plumbers, septic additive manufacturers, septic pumpers, and a litany of unknown companies as well. A0227, pp.24-27. In fact, Zabel testified he does not even know who his biggest competitors are. A0227, pp.24-25.

In the more than three years since starting Septicair Aid (from July 2011 until April 2014), Zabel has sold approximately 151 units to 145 customers. A0501. Other than March 2012 (13 units) and April 2012 (16 units), Zabel has never sold more than eight units in any given month. *Id.* Zabel has spent a total of $3,000 in advertising, all in 2011 and 2012. A0231, pp.40-42. Zabel has not spent any money on advertising in 2013 and 2014. *Id.* Septicair Aid has never filed tax returns. A0239, p.75.

D. Aero-Stream is Forced to Take Legal Action Against Zabel.

Shortly after registering the septicairaid.com domain name, the Septicair Aid website began displaying false and misleading information concerning Aero-Stream and its products. A0302, ¶ 24. As a defensive measure to Zabel's display of false and misleading information about Aero-Stream, as well as Zabel's misuse of Aero-Stream's confidential, proprietary and trade secret information, Holt registered several domain names containing the name "septicairaid" but with various extensions (*e.g.* ".biz," ".us"). A0302, ¶ 25.

Holt registered these domain names on or about July 2011 through September 2011. A0164, ¶¶ 12-15. When Holt registered the domain names (no later than September 2011), Septicair Aid had been in business for less than four months, sold less than ten units, and spent no more than $3,000 in advertising.[1] A0231, pp.40-42; A0501. No admissible evidence of any other market penetration is in the record.

Holt has since caused those websites to be "parked."[2] All but one of those domain names has been parked since October 22, 2013, and the last site (www.septicairaid.net) has been parked since February 20, 2014. A0302, ¶¶ 26-27.

On March 13, 2012, Zabel applied for a trademark registration on the name "Septicair Aid." A0254. The application was rejected, and Zabel abandoned that application when he was faced with an additional $150 fee. A0254; A0230, p.39.

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[1] The timing of this registration is significant to Zabel's claim for cybersquatting. That claim requires trademark rights be established at the time the allegedly improper domain names are registered. 15 U.S.C. § 1125(d)(1)(A)(ii)(I). Without a federal trademark registration, and without any market penetration or sufficient use in commerce of its alleged trademark, Zabel could not possibly establish trademark rights at all, *let alone* as of September 2011.

[2] A "parked" domain name simply directs users to an unregistered website maintained by the web hosting company.

On March 14, 2012, Aero-Stream filed an action in Wisconsin state court. Aero-Stream sought, *inter alia*, an injunction to prevent Zabel from disparaging Aero-Stream on Zabel's website. A0302-0303, ¶ 28. On May 10, 2012, the Honorable Judge Dreyfus, Jr. agreed, and ordered Zabel to refrain from "placing on his website any reference to … Aero-Stream, [its] product, [its] pricing, comparisons, or any references whatsoever." A0313. Despite the injunction, Zabel again published disparaging information on Septicair Aid's web site, and Judge Dreyfus found Zabel in contempt on December 5, 2013, for violating the court's Order.[3] A0315-0317.

In addition, Aero-Stream filed the present suit against Zabel on February 24, 2012, alleging Zabel infringed Aero-Stream's patents. A0212, ¶ 59. Zabel counterclaimed, alleging that Aero-Stream's patent was invalid and that he did not infringe Aero-Stream's patent. A0155-0156, ¶¶ 26-29. Zabel also brought counterclaims for Lanham Act violations; specifically, trademark infringement, unfair competition, and cybersquatting. A0156-0158, ¶¶ 30-42.

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[3] After the District Court granted summary judgment in this case, Aero-Stream also moved for summary judgment in Wisconsin State Court as to Zabel's counterclaims. There, the Wisconsin State Court also dismissed Zabel's claims against Aero-Stream, and in fact, Zabel did not file a response. *See* https://wcca.wicourts.gov, Waukesha County Case No. 12-CV-882 (last visited July 13, 2015). Zabel's counsel of record in this case is also counsel of record in the Wisconsin State Court case.

Aero-Stream then moved for summary judgment on Aero-Stream's trademark counterclaims. A0176-0177. Aero-Stream also voluntarily dismissed its patent infringement claim, and moved for sanctions under Rule 11. A0321-0322; A0806-0809. After voluntarily dismissing its patent infringement claim, Aero-Stream moved to dismiss Zabel's non-infringement and invalidity counterclaims, arguing the District Court did not have jurisdiction because there was no longer a justiciable controversy. A0806-0809.

In response to Aero-Stream's voluntary dismissal without prejudice of its patent infringement claim, Zabel opposed Aero-Stream's motion regarding jurisdiction over the patent counterclaims, and argued a justiciable controversy remained. Zabel simultaneously requested fees under Fed. R. Civ. P. 41.

On March 5, 2015, the District Court granted Aero-Stream's Motion for Summary Judgment, holding Zabel did not have trademark rights in "SepticairAid." The District Court also summarily denied Aero-Stream's Motion for Sanctions, stating only that "I cannot say that defendants filed the claims with the purpose to harass, cause unnecessary delay, or needlessly increase the cost of litigation, or that the claims were frivolous or filed without reasonable and competent inquiry." A0008.

The District Court dismissed Zabel's non-infringement and invalidity counterclaims, holding the Court no longer had jurisdiction because "the remote possibility of a claim at some point in the future is too speculative to support jurisdiction," in large part because "the parties concede that the reexamination[4] precludes plaintiff from bringing the same claim again." A0010-0011.

The District Court also denied Zabel's request for attorneys' fees, holding that "It is impossible to discern from [Zabel's] submission how much of the amount requested was actually incurred defending the patent infringement claims." A0011.

The parties both filed timely notices of appeal.

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[4] The original patent claims issued on September 7, 2007. A0045, ¶ 2. Aero-Stream asserted that Zabel infringed original claim 1. A0045–0049. Original claim 1 was cancelled during reexamination. A0455–0457. Aero-Stream did not amend its pleadings to assert infringement of any reexamined claim. *See also* DE 17 pp.12-14.

SUMMARY OF THE ARGUMENT IN RESPONSE TO ZABEL

I. Zabel's Trademark Counterclaims Are Wholly Without Basis In Law Or Fact.

In dismissing Zabel's trademark counterclaims, the District Court stated: "I conclude that 'SepticairAid' is a descriptive mark, and that no reasonable factfinder could conclude that it is suggestive. The term consists of three words, 'septic,' 'air,' and 'aid.' These words directly describe what the product does; it aerates septic systems." A0005.

On appeal, Zabel merely argues the District Court did not examine the record in "light most favorable to SepticairAid." Yet, as is evident from the District Court's ruling, no additional examination of the record was necessary. Considering the undisputed purpose of Zabel's product, SepticairAid is descriptive as a matter of law. Further, no reasonable factfinder could possibly determine that the mark in question developed secondary meaning in the marketplace. The District Court properly ruled that Zabel does not possess trademark rights in Septicair Aid.

II. Zabel's Patent Counterclaims Present No Justiciable Controversy.

Aero-Stream dismissed its patent infringement complaint, albeit without prejudice. Because the underlying patent had been reexamined after Aero-Stream filed its Complaint, and because Aero-Stream never reasserted the new patent claims, "it is clear—and the plaintiff admits—that it cannot bring the infringement claim alleged in this lawsuit again." A0009, n.2. The District Court correctly concluded that there was no "actual controversy sufficient to justify continued jurisdiction over defendants' declaratory judgment claims," and its dismissal should be affirmed.

III. Zabel's Attorneys' Fees Request Was Properly Denied.

In response to Aero-Stream's dismissal without prejudice, Zabel submitted an attorneys' fee petition, in which he included every single penny of attorneys' fees allegedly incurred in his legal disputes with Aero-Stream. Such a request is facially improper. Federal Rule of Civil Procedure 41 provides for the award of fees in a voluntary dismissal without prejudice only when those fees would need to be duplicated if the original claims were re-filed in the future. The District Court properly denied Zabel's fee petition for failure to comply with Rule 41 because Zabel did not actually incur any recoverable fees, and because Zabel failed to identify any amounts of the fees incurred that would be recoverable under Rule 41.

IV. Summary Of Aero-Stream's Cross-Appeal Argument

The District Court denied Aero-Stream's Rule 11 Motion for Sanctions, explaining only that it could not necessarily conclude that Zabel filed those counterclaims "with the purpose to harass, cause unnecessary delay, or needlessly increase the cost of litigation, or that the claims were frivolous or filed without reasonable and competent inquiry." A0008. No other analysis or explanation was provided. Because it failed to provide any analysis or rationale for its decision, the District Court erred as a matter of law. This Court should reverse and remand for further consideration of Aero-Stream's Motion for Sanctions.

ARGUMENT

I. Standards Of Review

"[B]ecause this [appeal] does not involve substantive issues of patent law, this court applies the laws of the regional circuit in which the district court sits, in this case the [Seventh] Circuit." *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008) (citation omitted).

The District Court's grant of summary judgment is reviewed de novo. *Patton v. MFS/Sun Life Fin. Distribs.*, 480 F.3d 478, 485 (7th Cir. 2007). While all reasonable inferences are made in Zabel's favor, that does not absolve Zabel of his duty to present evidence in support of his position and identify a genuine issue of material fact in dispute that precludes summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-28 (1986); *Caisse Nationale de Credit Agricole v. CBI Indus, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) ("A party seeking to defeat a motion for summary judgment is required to wheel out all of its artillery to defeat it.").

A District Court's "classification of a term along the spectrum of trademark protection — that is, as generic, descriptive, suggestive or arbitrary" is reviewed for clear error, "so that the classification may only be set aside if after considering all the evidence we are left with the definite and firm conviction that a mistake has been committed." *Forum Corp. of N. Am. v. Forum, Ltd.*, 903 F.2d 434, 438-39 (7th Cir. 1990) (citations omitted).

The District Court's denial of Zabel's Rule 41 request for fees is reviewed for an abuse of discretion. *Wells Fargo Bank, N.A. v. Younan Prop., Inc.*, 737 F.3d 465, 468 (7th Cir. 2013) (collecting cases, and summarizing the standard as, "the reviewing court must be highly confident that an error was committed.").

When analyzing a District Court's holding on a Rule 11 motion, this Court reviews the "findings of fact with respect to the imposition of sanctions under the clearly erroneous standard. Subsequently, [it] review[s] *de novo* the court's legal conclusion that conduct in a particular case constitute[s] a violation of Rule 11." *Flip Side Prods., Inc. v. Jam Prods., Ltd.*, 843 F.2d 1024, 1036 (7th Cir. 1988) (citations omitted); *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1328 (Fed. Cir. 2011) (using the law of the regional circuit to evaluate the denial of a motion for sanctions).

II. The District Court Correctly Determined Defendants Did Not Meet Their Burden Of Establishing Trademark Rights In "Septicair Aid."

A. "Septicair Aid" is not a distinctive mark.

When, as here, the mark claimed as a trademark is not federally registered, the burden is on the claimant to establish that it is not an unprotectable generic mark. *Mil-Mar Shoe Co., Inc. v. Shonac Corp.*, 75 F.3d 1153, 1156 (7th Cir. 1996) (citing *Tech. Publ'g Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir.

1984)). The Septicair Aid mark is not federally registered, and Zabel therefore has the burden to prove 'Septicair Aid' is entitled to protection. *Id*., *Thomas & Betts Corp. v. Panduit Corp*., 108 F. Supp. 2d 976, 986 (N.D. Ill. 2000); A0230, p.39.

"In general, the level of trademark protection available corresponds to the distinctiveness of the mark." *Platinum Home Mortgage Corp. v. Platinum Fin. Group, Inc*., 149 F.3d 722, 727 (7th Cir. 1998). Marks are classified into five categories: 1) generic; 2) descriptive; 3) suggestive; 4) arbitrary; or 5) fanciful. *Two Pesos v. Taco Cabana*, 505 U.S. 763, 768 (1992).

Marks that constitute a common descriptive name are referred to as generic. A descriptive mark "describes the qualities or characteristics of a good or service." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc*., 469 U.S. 189, 194 (1985). Such a mark is not inherently distinctive, and may be registered "only if the registrant shows that it has acquired secondary meaning, *i.e.*, it has become distinctive of the applicant's goods in commerce." *Id*. Factors to consider in determining whether a descriptive mark has developed secondary meaning include: 1) the amount and manner of advertising; 2) the volume of sales; 3) the length and manner of use; 4) direct consumer testimony; and 5) consumer surveys. *Gimix, Inc. v. JS & A Group, Inc*., 699 F.2d 901, 907 (7th Cir. 1983).

As the District Court held here, "Septicair Aid" is plainly descriptive. The company sells aerators, to aid septic systems. A0153, ¶ 10. This description of the qualities and characteristics of the product sold commands a "descriptiveness" finding. *Gimix, Inc.*, 699 F.2d at 905. The name Septicair Aid "imparts information directly," that is, a user knows precisely what the mark represents without any further information needed. *Custom Vehicles, Inc. v. Forest River, Inc.*, 476 F.3d 481, 483 (7th Cir. 2007) (the mark "Work-N-Play" was descriptive of vans usable for both business and leisure, because "it describes the product category to which the brand belongs"). Here, "Septicair Aid" indicates *precisely* the product category to which the business name belongs – septic system aerators. Therefore, "Septicair Aid" is a descriptive mark. *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 641 (7th Cir. 2001); *see also World Impressions, Inc. v. McDonald's Corp.*, 235 F. Supp. 2d 831, 840 (N.D. Ill. 2002) ("the phrase 'Thirst Aid' is descriptive when used for a drink that quenches thirst").

Zabel argues that "Septicair Aid" is suggestive rather than descriptive because it "does not describe an aeration system which uses a pump, tube, and air stone, in contrast to the other septic aeration devices being sold generally." A0610; DE 17, p.28.[5] Yet, this is incorrect because there is no requirement that a descriptive mark be as exhaustive as a patent application or a blue print. All that is required is that the mark "identif[y] a characteristic or quality of the article or service." *Union Nat'l Bank v. Union Nat'l Bank*, 909 F.2d 839, 845 (5th Cir.

[5] Zabel's opening brief, docket entry 17 in this appeal, is cited as "DE 17, p.__."

1990); *see also Seventh Cir. Pattern Jury Instruction* 13.1.2.2.3 ("'All Bran' for cereal is a descriptive trademark because it describes a characteristic of the cereal.").

Zabel also argues that "Septicair Aid" is suggestive because "the consumer is required to exercise 'some operation of the imagination' to associate the mark with Septicairaid, LLC's goods." But the "degree of imagination" the case law speaks about "refers to the mental process required to connect a name that is incongruous or figurative with the product (*e.g.*, 'Roach Motel' with an insect trap or 'TIDE' with soap), not the intermediate thought process needed to translate initials into the name which directly describes the salient characteristic of the product." *G. Heileman Brewing Co. v. Anheuser-Busch, Inc.*, 873 F.2d 985, 997 (7th Cir. 1989). As the District Court noted, "to be considered descriptive, a mark need not contain a complete description of a product. A mark is descriptive if it describes a product characteristic that figures prominently in the consumer's decision whether to buy the product…" A0005.

Here, "Septicair Aid" simply describes the "salient characteristic of the product." *Id.*; *see also Money Store v. Harriscorp Finance, Inc.*, 689 F.2d 666, 674 (7th Cir. 1982) (asking whether the mark "necessarily convey[ed] the essence of the business" to determine whether the mark was descriptive). The name conveys the "essence" of the product – it is therefore descriptive and not suggestive. As the District Court held, "'SepticairAid' is a descriptive mark.... **The term consists of three words, 'septic,' 'air,' and 'aid.' These words directly describe what the product does; it aerates septic systems.**" A0005 (emphasis added). The District Court did not err in holding SepticairAid descriptive of Zabel's product.

B. "Septicair Aid" has not acquired secondary meaning.

Secondary meaning is "a mental association in buyers' minds between the alleged mark and a single source of the product." 2 J. Thomas McCarthy, Trademarks and Unfair Competition § 15:5, at 15-9 (4th ed. 2001). A mark acquires secondary meaning when it has been used so long and so exclusively by one company in association with its goods or services that the word or phrase has come to mean that those goods or services are the company's trademark. *Id.* at § 15:5, at 15-10; 15 U.S.C. § 1052(f) (use of the mark "in commerce for the five years before the date on which the claim of distinctiveness is made" may constitute *prima facie* evidence of acquired distinctiveness).

Here, the District Court correctly ruled that as a matter of law, Septicair Aid did not acquire any secondary meaning. A0007.[6] The District Court's conclusion was correct, and there is no contrary evidence in the record that could lead to any other conclusion.

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[6] "Based on [Defendants' sales and advertising] numbers, no reasonable factfinder could conclude that the term 'SepticairAid' has developed secondary meaning. SepticairAid has been in business a very short time, has spent virtually nothing on advertising, and has average less than $40,000 a year in gross sales." A0007. Zabel cites nothing to the contrary.

Zabel has failed to point to evidence that could possibly show that "in the minds of the public, the primary significance of [the name Septicair Aid] is to identify the source of the product rather than the product itself." *Two Pesos*, 505 U.S. at 766 n.4; *see also Walt-West Enter., Inc. v. Gannett Co., Inc.*, 695 F.2d 1050, 1055-56 (7th Cir. 1982). Zabel has sold only 151 units since creating Septicair Aid in 2011, has not spent a single dollar in advertising since 2012, and has no evidence in support of a finding of secondary meaning. A0231, pp.40-42; A0241, p.83; A0501; *Gimix, Inc.*, 699 F.2d at 907.

To create a fact question, Zabel would have had to present admissible evidence sufficient to support a conclusion that a "**substantial portion of the consuming public** identifies [Septicair Aid] with a particular source, whether or not consumers know who or what that source is." Seventh Cir. Pattern Jury Instruction 13.1.2.2.4 (emphasis added.) Yet, Zabel failed to present any such evidence, whether through an expert or consumer testimony saying that "Septicair Aid" designates Zabel's company or any other singular entity as the seller of a particular product or line of products. There is simply **no evidence** from which the Court could possibly find that "Septicair Aid" has acquired secondary meaning.

Indeed, all of the undisputed evidence confirms that "Septicair Aid" had not acquired secondary meaning and could not have acquired secondary meaning.

Further, to prevail on his claims, Zabel must also show Septicair Aid established distinctiveness as of the date of Holt's domain name registration (between July and September, 2011). At that point, Zabel had **sold less than ten total units and spent no more than $3,000 in advertising** for Septicair Aid. A0231, pp.40-42; A0501. Zabel has no basis to claim that "Septicair Aid" obtained any distinctiveness or secondary meaning in the marketplace, let alone at the time Holt registered the domain names.

Zabel also points to how many times their website was allegedly accessed during a particular time frame. DE 17, p.29. Yet, as the District Court correctly held below, "Internet visibility does not indicate consumer acceptance or recognition and, in itself, is insufficient to overcome the company's meager sales and non-existent advertising." A0007, citing *555-1212.com, Inc. v. Commc'n House Int'l, Inc.*, 157 F. Supp. 2d 1084, 1091 (N.D. Cal. 2001) (concluding that status as one of the top 500 websites that attract the most unique visitors indicates only "that a large number of Internet users visit plaintiff's web site" and "does not provide any reasonable inference . . . that these users perceive plaintiff's domain name as a brand name"); *Aktieselskabet AF 21 Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 20 (D.C. Cir. 2008) (holding "sporadic or minimal sales are not sufficient" to obtain trademark rights) (internal citations omitted); *Papa Ads, LLC v. Gatehouse Media, Inc.*, 2011 U.S. Dist. LEXIS 155496, at *24-25 (N.D. Ohio Mar. 22, 2011) (rejecting the assertion that over 1,000 website sales of over $500,000 was sufficient to acquire secondary meaning because even 1,000 separate consumers constituted a small percentage of local population).

There is no fact question here. Zabel has conceded his minimal sales, his almost complete lack of advertising, and the absence of any evidence of recognition or confusion in the marketplace. A0629, ¶ 63; A0630, ¶ 69. Zabel testified he had no evidence "of any individual being confused between the identity of Aero-Stream and Septicair Aid." A0234, pp.53-54. Zabel's secondary meaning argument is insufficient as a matter of law to meet his burden, there is no evidence in the record upon which a reasonable fact-finder could find secondary meaning, and the District Court's entry of summary judgment should be affirmed.

C. Even if the District Court Judge Erred In Holding The Defendants Did Not Obtain Trademark Rights, It Was Harmless Error.

1. Zabel Cannot Establish Sufficient Use In Commerce To Obtain Trademark Rights.

Even if this Court were to disagree with the District Court's analysis on Septicair Aid's descriptiveness and lack of secondary meaning, any such error is harmless because the unrebutted record evidence establishes Zabel did not sufficiently use the mark in commerce to earn trademark rights.

It is well established that common law trademark rights are based on use. Minimal use of a trademark is not sufficient to establish common law trademark rights. *See Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499 (7th Cir. 1992). In *Zazu*, the district court found plaintiff's limited sales established common law trademark rights in the mark. The Seventh Circuit reversed, noting that the district court erred when it equated "a use sufficient to support registration with a use sufficient to generate nationwide rights in the absence of a registration." *Zazu*, 979 F.2d at 505. According to the Seventh Circuit, "use sufficient to register a mark that soon is widely distributed is not necessarily enough to acquire rights in the absence of registration." *Id.* at 503. Based on plaintiff's limited sales and the absence of a registration, the Court concluded that "[Plaintiff's] sales of [its products] were **insufficient as a matter of law** to establish national trademark rights at the time [defendant] put [its products] on the market." *Id.* (emphasis added).

Other courts have similarly rejected claims of common law trademark rights based on minimal market penetration. "When sales activity does not exceed even a minimum threshold level, a court may properly conclude that the market penetration sufficient to support injunctive relief simply has not been demonstrated." *Natural Footwear Ltd. v. Hart, Schaffner & Marx*, 760 F.2d 1383, 1400 (3d Cir. 1985). For example, in *Natural Footwear*, sales of less than $5,000 in a single state within a year or sales to less than 50 customers within a single state within a year were "so sporadic that market penetration was de minimis" and common law rights could not be established. *Id*. Similarly, sales of 553 T-shirts and 324 hats dispersed across 16 stores in seven states in a year "do not come close to the minimum level necessary to achieve market penetration." *Smith v. Ames Dep't Stores, Inc*., 988 F. Supp. 827, 839 (D.N.J. 1997) (granting summary judgment because plaintiff failed to establish common law rights in the "Big Guy" mark based on limited sales).

Applying these principles here, Zabel cannot establish common law trademark rights in "Septicair Aid." Septicair Aid's sales volume, either annually or collectively, is even more dismal than the insufficient sales found in *Zazu*, *Natural Footwear* and *Smith*. In the more than three years it has been in operation, Septicair Aid has sold approximately 151 units to 145 customers. Other than in March 2012 (13 units) and April 2012 (16 units), Septicair Aid has never sold more than eight (8) units in any given month. A0501. And as established above, Zabel's lack of trademark rights is even more pronounced when evaluated as of the date Holt registered the allegedly offending websites, which was no later than September 2011. 15 U.S.C. § 1125(d)(1)(A)(ii)(I) (requiring the trademark be distinctive "at the time of the registration of the domain name" for cybersquatting liability).

Finally, Septicair Aid's promotion and advertising fall far short of demonstrating sufficient market penetration to establish trademark rights in the Septicair Aid name. Septicair Aid has spent a total of $3,000 in advertising, all in 2011 and 2012. A0231, pp.40-42. Septicair Aid did not spend any money on advertising in 2013 or 2014. Such minimal efforts are insufficient, as a matter of law, to establish common law rights in "Septicair Aid." *See, e.g.*, *Smith*, 988 F. Supp. at 839 (noting participation in six trade shows constituted a minimal advertising effort and could not establish a common law right); *Glow Indus., Inc. v. Lopez*, 252 F. Supp. 2d 962, 985 (C.D. Cal. 2002) (finding that availability of the trademarked product on the Internet and mentions in national magazines failed to establish common law rights in any specific geographic area).

2. Zabel Admitted He Cannot Satisfy The Bad Faith Requirement For A Cybersquatting Claim.

"Septicair Aid" plainly is without trademark rights. Yet, even if this Court were to conclude the District Court erred in arriving at that holding, the error is harmless as it relates to Zabel's cybersquatting claim. This is because, as a matter of law, Aero-Stream did not have "bad faith intent to profit" from registering the domain names in question.

"The key to a cybersquatting claim … is bad faith intent to profit." *Land's End, Inc. v. Remy*, 447 F. Supp. 2d 941, 948 (W.D. Wis. 2006) (citing *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 680-681 (9th Cir. 2005)). Here, Zabel has **no**

evidence that he had any goodwill to appropriate as of July 2011, when he sold less than 10 units and spent less than $3,000 in advertising of his products. Even if Zabel were able to show that he *had* some goodwill, it is **undisputed** that Mr. Holt acted to protect Aero-Stream, not to profit off of any alleged Zabel goodwill. Further, Zabel conceded that, "Plaintiff did not register the 11 domain names at issue to re-sell them at a profit." A0614. As such, this case does not fit within the ACPA, where "[t]he paradigmatic harm that the ACPA was enacted to eradicate — the practice of cybersquatters registering several hundred domain names in an effort to sell them to the legitimate owners of the mark — is simply not present…" *Lucas Nursery & Landscaping, Inc. v. Grosse*, 359 F.3d 806, 810 (6th Cir. 2004) (affirming summary judgment in favor of the defendant on a cybersquatting claim based upon on, *inter alia*, a failure to show bad faith).

Lastly, even if Zabel could point to some fact in the record that could show Aero-Stream's bad faith intent to profit, he has admitted he did not suffer any harm, or at least could not point to any evidence of actual harm suffered. A0239, pp.74-75.

3. As A Matter Of Law, Zabel Cannot Show Confusion In The Marketplace.

Lastly, any error in dismissing Zabel's trademark counterclaims on the basis of a lack of trademark rights would be harmless because Zabel admittedly has no evidence or proof of confusion in the marketplace. Zabel confirmed he did not have "any evidence of any individual being confused about the product offered by Septicair Aid or Aero-Stream," nor did he have "any evidence of any individual being confused between the identity of Aero-Stream and Septicair Aid". A0234, pp.53-54.

Zabel's sole proffered evidence to support a "likelihood of confusion" was that Zabel experienced an alleged "drop in sales." A0233-0234, pp.51-53. Zabel's only support for this alleged drop in sales is a spreadsheet depicting Zabel's total customers per month. A0501. But, not only do Zabel's own records show that his sales *increased* following Aero-Stream's allegedly improper acts, the alleged sales drop corresponds perfectly with the May 11, 2012, Wisconsin state court Order prohibiting Zabel from posting information about Aero-Stream on its website. (*Compare* A0242-0243, pp.83-84, *with* A0501, showing sales in March 2012 of 13 units; in April 2012 of 16 units; and in May 2012 of 7 units).

Additionally, Zabel admits that the septic remediation marketplace is so competitive that he could not even begin to know with whom Septicair Aid actually competes. A0227, pp.24-27. It is axiomatic that Zabel cannot contend customers are likely to be deceived when he does not even know against whom he competes. Without any evidence in the record regarding any likelihood of confusion, Zabel's claims were properly dismissed.

III. The District Court Properly Decided Not To Retain Jurisdiction Over Zabel's Patent Counterclaims After Aero-Stream Dismissed Its Patent Infringement Suit.

Aero-Stream dismissed its patent infringement allegations without prejudice. Aero-Stream then sought dismissal of Zabel's non-infringement and invalidity counterclaims, arguing that because no justiciable controversy remained, the District Court lacked jurisdiction over those counterclaims. Zabel had the burden of proof to show a substantial controversy existed "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Benitec Australian, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1343 (Fed. Cir. 2007). Over Zabel's objection, the District Court held no such controversy existed and dismissed Zabel's patent counterclaims. Zabel now argues that the District Court erred in dismissing his patent counterclaims, despite black letter law that the Declaratory Judgment Act may not be used to "secur[e] an advisory opinion in a controversy which has not arisen." *Coffman v. Breeze Corps.*, 323 U.S. 316, 324 (1945).

The patent claims raised in both the Second Amended Complaint (A0045) and Zabel's Second Amended counterclaims (A0152) concern the original claims of the '727 patent that issued on September 4, 2007. A0825-0827. Aero-Stream did not amend its Second Amended Complaint (filed October 26, 2012) to assert that Zabel infringed claims from the reexamined patent that subsequently issued on October 29, 2013.

There is an important distinction between the original patent claims and the reexamined patent claims. The original patent claims issued on September 7, 2007. A0045, ¶ 2. Aero-Stream asserted that Zabel infringed original claim 1. A0045–0049. Original claim 1 was cancelled during reexamination. A0455–0457. Aero-Stream did not amend its pleadings to assert infringement of any reexamined claim. The distinction between the original patent claims and the reexamined patent claims is important because Aero-Stream's allegations that Zabel infringed Aero-Stream's original patent claim 1 are cannot be re-asserted—the USPTO canceled claim 1 during reexamination. A0009, n.2.[7]

Notably, although Zabel vaguely asserts the reexamined patent claims were asserted by Aero-Stream, he does not point to any discovery or motion practice showing that the reexamined claims were actually asserted and litigated. As Zabel does not (and could not) allege that the patent's reexamined claims are identical to the original patent claim asserted in the Second Amended Complaint, and as the reexamined patent claims have never been asserted or litigated, Zabel's counterclaims for non-infringement and invalidity were properly dismissed.

[7] The District Court explained, "it is clear—and plaintiff admits—that it cannot bring the infringement claim alleged in this lawsuit again. Thus, the parties' preoccupation with whether the dismissal is with or without prejudice is inconsequential because the effect is the same."

IV. The District Court Correctly Denied Zabel's Request For Fees.

After Aero-Stream's voluntary dismissal of its patent infringement claim, Zabel moved the court for an award of all of its attorneys' fees incurred in the litigation between the parties, allegedly under the guise of Fed. R. Civ. P. 41(a)(2). A0830–0831. The District Court, in its discretion, properly denied Zabel's request because Zabel "will not incur duplicative legal expenses," and because, "[i]t is impossible to discern from defendants' submission how much of the amount requested was actually incurred defending the patent infringement claims." A0011.

Zabel now alleges the District Court abused its discretion in denying Zabel's fee petition, because "the court did not exercise its discretion and 'scrutinize' the [attorney invoice] statements … nor did it request clarification from" Zabel. DE 17, p.45. Zabel's assertion is contrary to law.

In a case dismissed without prejudice under Rule 41, a "fee award should reimburse the defendant for expenses incurred in preparing work product that will not be useful in subsequent litigation of the same claim." *Cauley v. Wilson*, 754 F.2d 769, 772 (7th Cir. 1985). Based upon that stated purpose, any fees awarded should be limited to "expenses incurred in preparing work product that will not be useful in subsequent litigation of the same claim." *Id.* Rule 41(a)(2) "grants a district court broad discretion to impose conditions on a voluntary dismissal of a claim," which may or may not include a discretionary award of reasonable attorneys' fees. *Mother & Father v. Cassidy*, 338 F.3d 704, 709 (7th Cir. 2003); *see also Marlow v. Winston & Strawn*, 19 F.3d 300, 306 (7th Cir. 1994).

Zabel's request fails the requirements of Rule 41 for several reasons. First, when he filed his fee petition, Zabel did not preface that request in the manner he does now. Rather, Zabel sought reimbursement of every penny ever charged to Zabel, by three separate law firms, throughout his disputes with Aero-Stream. A0830–0833. This totaled over $70,000. Now Zabel attempts to foist the burden onto the District Court to wade through his submissions and try to determine what amounts, if any, may be duplicative. DE 17, p.45. Such a request is improper on its face. *Casna v. City of Loves Park*, 574 F.3d 420, 424 (7th Cir. 2009) (dismissing party's argument when that party failed to point to specific facts supporting their position, and citing *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) for the proposition that "'Judges are not like pigs, hunting for truffles buried in' the record.")).

Second, the District Court properly held that Zabel *does not face duplicative litigation*. Instead, "it is clear—and plaintiff admits—that it cannot bring the infringement claim alleged in this lawsuit again." A0009, n.2. Rule 41 grants the court discretion to make a fee award only when the defendant establishes that it actually incurred reasonable and necessary legal fees to defend claims that are being dismissed without prejudice, and only to prevent the prejudice of having to defend the same claims again in the future. *See generally* Fed. R. Civ. P. 41; *Cauley*, 754 F.2d at 772. The District Court correctly held that Zabel's fee request failed to comply with Rule 41 for at least these two reasons.

Lastly, even if this Court were to analyze the record, and even if this Court were to conclude Zabel may face litigation on the voluntarily-dismissed patent claims, Zabel's fee petition must still be denied in whole. This litigation did not reach the point of subjecting Zabel to fees which may have to be duplicated. Zabel's citation to *LeBlang Motors, Ltd. v. Subaru of Am., Inc.*, 148 F.3d 680 (7th Cir. 1998) proves this point. In *LeBlang*, the plaintiff sought voluntary dismissal one week before trial, and "explicitly agreed to pay [the defendant's] costs of trial preparation." *Id.* at 686. Trial preparation on claims that might be re-litigated is precisely the type of expense that Rule 41 is permitted to compensate—reasonable and necessary costs that would require duplication if a second litigation on the very same claims were to occur.

Here, no such expenses on the patent infringement claim were incurred; the parties were never close to trial, no trial preparation expenses were accumulated, and no expert expenses were incurred. Zabel never offered any argument or evidence that **any** of the fees he allegedly incurred would have to be duplicated. Accordingly, Zabel's request for fees is wholly without legal support and the District Court's denial of this fee petition should be affirmed.

Indeed, to represent to this Court that over $70,000 was actually and reasonably incurred by the Defendants to defend Aero-Stream's patent infringement claims is both unsupported and unsupportable, and is yet another example in Defendants' pattern of frivolous litigation conduct.

V. Aero-Stream's Cross Appeal

A. The District Court Abused Its Discretion In Denying Aero-Stream's Motion For Sanctions.

The District Court abused its discretion in denying Aero-Stream's Motion for Sanctions for two reasons. First, the District Court failed to consider the undisputed record evidence which establishes that Zabel filed and pursued his trademark counterclaims in bad faith and for the purpose of harassing Aero-Stream. Second, although the District Court concluded that Zabel's assertion of trademark counterclaims did not violate Rule 11, it failed to identify any basis for Zabel's counterclaims that supports the conclusion that they were in fact grounded in good faith. Under the circumstances, the District Court abused its discretion.

The "central purpose of Rule 11 is to deter baseless filings." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). Rule 11 provides two grounds for sanctions: the "frivolousness clause" and the "improper purpose" clause. Fed. R. Civ. P. 11(b). The frivolousness clause requires the party or its counsel to conduct a reasonable inquiry into the facts and the law relevant to the case. *Kilopass Tech., Inc. v. Sidense Corp.*, 738 F.3d 1302, 1308-09 (Fed. Cir. 2013) ("Rule 11 functions to assure that parties assert litigation positions that are objectively reasonable **at the time of filing**.") (emphasis added, citing *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1372 (Fed. Cir. 2013) noting that Rule 11 sanctions are appropriate when a plaintiff asserts frivolous claims in its complaint).

The improper purpose clause requires, *inter alia*, that claims "may not be interposed for purposes of delay, harassment, or increasing the costs of litigation." *Flip Side Prods., Inc. v. JAM Prods., Ltd.*, 843 F.2d 1024, 1036 (7th Cir. 1988). Rule 11 is evaluated under an objective standard. *Kilopass*, 738 F.3d at 1313 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991)).

Here, Zabel does not and cannot meet his Rule 11 requirements. First, his trademark counterclaims were for the purpose of harassment, served to increase the cost of litigation, and reflect overall bad faith. *See* Fed. R. Civ. P. 11(b)(1). And not only is Zabel's purpose to harass his former employer, his claims of trademark ownership have no legal merit and do not satisfy Rule 11's "nonfrivolous" requirement. Fed. R. Civ. P. 11(b)(2). Indeed, the only reasonable conclusion one can reach is that Zabel and his counsel filed his trademark counterclaims without any inquiry into the underlying law and facts, continued these claims despite knowing they were frivolous, and pursued them only to harass Aero-Stream and increase Aero-Stream's litigation expense.

Because of Zabel's bad faith and frivolous litigation, Aero-Stream moved for Rule 11 sanctions against Zabel. A0321–0322. But the District Court failed to analyze the presented facts and law when deciding that motion, and held only that:

> I cannot say that defendants filed the claims with the purpose to harass, cause unnecessary delay, or needlessly increase the cost of litigation, or that the claims were frivolous or filed without reasonable and competent inquiry.

A0008.

This sentence reflects the entirety of the District Court's consideration of Aero-Stream's Rule 11 motion, and the District Court therefore abused its discretion in denying Aero-Stream's Motion without analysis or identification of any good faith basis to justify Zabel's counterclaims. *S. Bravo Sys., Inc. v. Containment Techs. Corp*., 96 F.3d 1372, 1375 (Fed. Cir. 1996) ("When the requesting party makes a strong showing that Rule 11 violations may have occurred, however, the district court should provide some explanation for disregarding the proffered showing."); *Copeland v. Wasserstein, Perella & Co*., 278 F.3d 472, 484-85 (5th Cir. 2002) ("It is well settled that, to conduct our review, we must be able to understand the district court's disposition of the sanctions motion."); *Refac Int'l Ltd. v. Hitachi, Ltd*., 921 F.2d 1247, 1257 (Fed. Cir. 1990) (when District Court does not provide a basis for its denial of a Rule 11 motion, "speculation is an inappropriate basis for review of that denial").

The District Court did not point to any facts in the record to support a possible good faith or objectively reasonable basis for Zabel's trademark counterclaims. Zabel also does not point to any facts in the record to support any good faith basis for his trademark counterclaims. And, that is because no record evidence has been identified that could conceivably provide a reasonable basis for Zabel's claims when he asserted them.

Zabel does not have *any* proof of trademark rights, and in fact did not even attempt a federal registration until after litigation began with Aero-Stream. A0254. Zabel does not have *any* proof of Aero-Stream having "bad faith intent to profit," the key factor to a cybersquatting claim, yet he initiated and continued to prosecute a cybersquatting claim **despite conceding he could not satisfy this element**. A0614; Section C(2), *supra*. And as is shown above and as the District Court correctly held, there is simply no basis in law for Zabel's arguments. His trademark counterclaims were frivolous when filed, and continue to be frivolous to this day. *See, e.g., Raylon LLC v. Complus Data Innovations Inc.*, 700 F.3d 1361, 1368 (Fed. Cir. 2012) (reversing a district court's denial of Rule 11 sanctions where "the district court failed to even touch on [movant's arguments] in its Rule 11 analysis. The district court's failure to consider these arguments was an abuse of discretion."); *Tech. Innovations, LLC v. Amazon.com, Inc.*, 35 F. Supp. 3d 613, 627-28 (D. Ct. Del. 2014) (citing *Raylon* and holding sanctions were warranted when "*even in light of what [plaintiff]* *proffers as a reasonable pre-suit investigation*, [plaintiff] was not objectively reasonable under the circumstances" in prosecuting its claims) (emphasis added).

In *Raylon*, the defendant moved the district court for Rule 11 sanctions, arguing that the plaintiff's claim construction argument was frivolous. The district court denied sanctions, but the Federal Circuit reversed and held that while "[r]easonable minds can differ" regarding various legal analyses, and losing positions are not necessarily frivolous, "there is a threshold below which [a litigant's argument] is so unreasonable that no reasonable litigant could believe it would succeed and thus warrants Rule 11 sanctions." *Id*. (internal citation omitted).

Here, Zabel's position on trademark rights is "so unreasonable that no reasonable litigant could believe" Septicair Aid had, for instance, developed secondary meaning. These facts – such as Septicair Aid's minimal sales and advertising efforts – were exclusively in Zabel's possession when he filed his trademark counterclaims. Despite this information, Zabel pursued these baseless claims and continues to do so to this day.

Determining what sanction to impose is initially a matter within the discretion of the district court. *Judin v. United States*, 110 F.3d 780, 785 (Fed. Cir. 1997). Therefore, Aero-Stream respectfully requests this Court reverse the denial of Aero-Stream's Motion for Sanctions, and remand for a determination of the appropriate sanction.

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth above and contained within the record, Aero-Stream respectfully requests this Court affirm the dismissal of Zabel's counterclaims, affirm the denial of Zabel's attorneys' fees petition, and reverse and remand on Aero-Stream's Motion for Sanctions.

Dated: July 23, 2015

/s/ S. Edward Sarskas
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on this the 23rd day of July, 2015, I electronically filed the foregoing Brief of Cross-Appellant with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following to all registered users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 717 Madison Place, N.W., Washington, D.C. 20439.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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CERTIFICATE OF COMPLIANCE
With Type-Volume Limitation, Typeface Requirements, And Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   this brief contains 8,356 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Times New Roman.

Dated: July 23, 2015

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